1982

The State of Utah v. Michael George Durant : Brief of Respondent

Utah Supreme Court

Nancy Bergeson; Manny Garcia; Attorneys for Appellant;
David L. WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18051
MICHAEL GEORGE DURANT,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a verdict of guilty of Aggravated Arson, a second-degree felony, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

NANCY BERGESON
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Michael George Durant, appeals from the conviction and judgment of Aggravated Arson, a felony in the second degree, in violation of Utah Code Ann., § 76-6-103 (1953), as amended.

DISPOSITION IN THE LOWER COURT

The appellant was tried and convicted in a bench trial of Aggravated Arson, a felony in the second degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding. The appellant was sentenced to an indeterminate term not to exceed five years, the judge having lowered the penalty to the next lowest category, pursuant to Utah Code Ann., § 76-3-402 (1953), as amended.

RELIEF SOUGHT ON APPEAL

The respondent seeks an order of this Court affirming the verdict and findings of the trial court.

STATEMENT OF FACTS

The respondent essentially adopts the facts as presented by the appellant with one exception. The appellant alludes to the "appellant and the owner" residing in the house which was burned. While testimony found on page 19 of the trial transcript (page 48 of the record of this case) indicates that Carl Rose "had the lease" or "rental" to the house, such indicates that he was a tenant in the house and did not own the property.

ARGUMENT

POINT I

THE APPELLANT'S CONVICTION OF AGGRAVATED ARSON WAS PROPER.

The statute under which the appellant was convicted, Utah Code Ann., § 76-6-103 (1953), as amended, provides:

> (1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:
> (a) A habitable structure; or
> (b) Any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.
> (2) Aggravated arson is a felony of the second degree.

Under the terms of the statute, the burning of any habitable structure or any structure or vehicle where another person is in that structure or vehicle is proscribed, regardless of the ownership of the structure or vehicle. It having been proved that the house burned in the instant case was a "habitable structure," the appellant and Carl Rose being residents thereof, and that the appellant burned the house, the appellant's conviction under the above statute was proper.

The appellant claims that in burning down the house, he was acting as an agent of Carl Rose, whom it is posited was the "owner" of the house. According to the appellant, an agent may not be guilty of a crime of which the principal could not have been found guilty. Here, the appellant states, since the principal, Carl Rose, as "owner" of the property, could not have been properly convicted of Aggravated Arson, neither could his agent, the appellant, be properly found guilty of the crime.

The appellant reaches the conclusion that the common law rule that a person may not be guilty of Arson by burning his own property extends to the statutory crime of Aggravated Arson through a creative twisting of the meaning of the word "unlawful" in both the Aggravated Arson statute, set out supra, and in the Arson statute, Utah Code Ann., § 76-6-102

(1953), as amended.[1] That statute provides, in pertinent part:

> (1) A person is guilty of arson if, under circumstances not amounting to aggravated arson, by means of fire or explosives, he unlawfully and intentionally damages:
> (a) Any property with intention of defrauding an insurer; or
> (b) The property of another.

The appellant asserts that since the term "unlawful" is not statutorily defined, it must be defined here in the terms of the other elements of the crime of arson. In other words, the "unlawful" conduct proscribed in the Arson statute must be either the burning of any property with the intention of insurance fraud or the burning of the property of another. Since there was no proof of insurance fraud in the instant case, the appellant posits that the definition of "unlawful" conduct under the Arson statute must, by default, be the burning of the property of another. Here, then, the appellant asserts that the definition of "unlawful" in the Arson statute must be "the burning of the property of another."

The appellant's argument is next dependent on incorporating the definition of "unlawful" reached under the

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[1]Under Utah Code Ann., § 76-1-105 (1953), as amended, common law crimes are abolished. So, too, presumably, are common law defenses. Thus, in order to assert the defense that an owner of property cannot be guilty of arson by burning it, the defendant must assert a statutory defense to the statutory crime.

above analysis of the Arson statute into the Aggravated Arson statute, where "unlawful" damage is a necessary element of the crime. According to the appellant, if an "unlawful" act means "the burning of the property of another" (in the Arson statute), and the Aggravated Arson statute includes as an element the "unlawful" damage, by fire or explosives, of a habitable structure or an inhabited structure or vehicle, then by definition the burned habitable structure or inhabited structure or vehicle must be the property of someone other than the actor in order for the actor to be guilty of Aggravated Arson. Thus, since Carl Rose was purportedly the "owner" of the burned property and the appellant his "agent," the argument goes, neither can be found guilty of Aggravated Arson.

The appellant's theory is meritless for several reasons. First, the appellant's assertion that since the word "unlawful" is not statutorily defined, it must take its meaning from the other elements of the crime (of arson) is ludicrous. Taken to its logical conclusion, the appellant's argument would render the word "unlawful" useless surplusage in each statute in which it appears, an interpretation which stretches the imagination in light of the overwhelming number of statutes in which the requirement that the act be "unlawful" is enumerated as a separate element. It is illogical that the Legislature would, through use of the word

"unlawful," set forth a separate element of a crime that would essentially be identical to the other elements of the crime. Indeed, the word "unlawful" would take on a different meaning in each statute in which it is used. Such would be an unnecessary repetition of the statutory elements, would add nothing, and make no sense.

Clearly, the statutory meaning of the word "unlawful" must be drawn from some other source than the statute in which it appears. The logical rendering of the word's statutory meaning is "without justification," the word "justification" drawing its meaning from Part Four of Chapter Two of Title 76 of the Utah Code Ann. (1953), as amended, which includes within its ambit numerous justifications which exclude criminal responsibility; the defense of persons or property, an actor's reasonable actions in fulfillment of governmental duties, reasonable discipline of minors by parents, guardians, teachers, or others in loco parentis, reasonable discipline of persons in lawful custody, and other justifications.[2] While respondent recognizes that this

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[2]The requirement that the act committed be "unlawful" in order for it to be criminal is found in the statutes outlawing Mayhem, Utah Code Ann., § 76-5-105 (1953), as amended; Criminal Homicide, Utah Code Ann., § 76-5-201 (1953), as amended; Criminal Mischief, Utah Code Ann., § 76-6-106(2) (1953), as amended; and Robbery, Utah Code Ann., § 76-6-301 (1953), as amended, without any statutory definition of the word "unlawful." Part Two of Section Six, Chapter 76, which deals with Burglary, Burglary of a Vehicle, and Criminal Trespass, a necessary element of each of which

definition, too, renders use of the word "unlawful" surplusage to a degree, such a definition is logical in light of its use throughout the criminal code. In any case, as unfortunate as it is that the Legislature has not provided a statutory definition of the word "unlawful," the respondent submits that the inferences drawn by the appellant from the absence of a definition are erroneous.

Even assuming that the appellant's logic that definition of the word "unlawful" can be drawn by reference to the statute in which the word appears is correct,

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is either "unlawfully" remaining or entering on property, gives the following definition:

> (3) A person "enters or remains unlawfully" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof (Emphasis added).

Utah Code Ann., § 76-6-201(3). Significantly, while kidnapping does not require that the act be "unlawful," Utah Code Ann., § 76-5-301(1) requires as an element that the act be "without authority of law." Custodial Interference, which also does not require "unlawful" conduct, does require, in Utah Code Ann., § 76-5-303(1), that the act be "without good cause." The crime of Rape, which also does not require an "unlawful" act, requires that the act be without the victim's consent. See Utah Code Ann., § 76-5-402 (1) (1953), as amended. Utah Code Ann., § 76-5-102(a) (1953), as amended, defines an assault as "an attempt, with unlawful force or violence, to do bodily injury to another." From this definition it may be implied that lawful, or justified force may be used to do bodily injury to another. Reference to Utah Code Ann., § 76-2-401, et seq., explains the circumstances under which such force is justified, or "lawful." Thus, read in light of the other statutes referred to above, the logic of the respondent's interpretation is further shown.

the appellant's assertion that the elements of the crime of Arson should be incorporated into the requirements of Aggravated Arson does not logically follow. Indeed, if the appellant's position is adopted, the definition of the word "unlawful" in the Aggravated Arson statute can be drawn from reference to the elements of that crime as set out in that statute. Reference to any other statute, including the Arson statute, would be unnecessary. In fact, it would make no more sense to adopt the definition of "unlawful" as used in the Arson statute to define the same word in the Aggravated Arson statute than it would to adopt a different definition of the word as it would be used in any of the other statutes in which it is found.

The appellant's tenuous argument that adoption of the defense that an owner cannot be convicted of Aggravated Arson by torching his own property must be "incorporated" as a defense to Aggravated Arson through his interpretation of the word "unlawful" falls of its own weight. The simple fact that the Legislature set out separate elements for each crime inveighs heavily against such an assertion. Had the Legislature intended the result propounded by the appellant, it would have spelled out specifically in the Aggravated Arson statute the requirement that for a defendant to be found guilty under its provisions, the property burned need be "that of another." It did not do so. The appellant's

"incorporation" theory, then, goes not only against common sense, but also is inconsistent with the notion that the Legislature spells out what it intends to enact in legislation it passes.

Whether the appellant is seen as an "owner" of the burned property,[3] or whether the "agency" shield from liability proposed by the appellant (neither theory of which was proved at trial) is seen as giving the appellant "owner" status, he would not be immune from prosecution or a finding of guilt under the Aggravated Arson statute. An owner of a habitable structure or any structure or vehicle in which any other person is present at the time of a fire may be guilty of Aggravated Arson if he causes the fire. Such is the clear intention of the Legislature. Such is the language of the Aggravated Arson statute.

The Kansas cases cited by the appellant, State v. Christendon, Kan., 468 P.2d 153 (1970); State v. Parrish, Kan., 468 P.2d 143 (1970); and State v. Parrish, Kan., 468 P.2d 150 (1970), are inapposite in this case. Although the Kansas Supreme Court applied the "agency" theory as set out by the appellant in his brief and held that the "agent" of an owner of burned property could not be held any more liable than the owner himself for the crime of first-degree Arson,

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[3]The fact that the appellant resided in the burned structure could be seen as giving him a "possessory interest" in the house sufficient to be an "owner" of the property. See § 76-6-101(3), supra.

the court's finding that an owner of property could not be found guilty of that crime was based on a Kansas statute which specifically required as an element of the crime that the property burned be that of another person. The statute under which the defendant in that case was prosecuted, Kansas Statutes Ann., § 21-581, provided:

> That any person who willfully sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, <u>such property being the property of another person</u>, shall be guilty of arson in the first degree, and upon conviction shall be punished by confinement and hard labor for not less than two nor more than twenty years (Emphasis added).

As has been emphasized above, unlike the Kansas first-degree Arson statute, the Utah Aggravated Arson statute contains no ownership requirement for a finding of guilt. To the degree that the Kansas statute requires a finding of ownership of the burned property, both it and any cases decided under it are inapplicable in Utah.

CONCLUSION

The appellant concedes that the Utah Legislature has adopted a policy that burning <u>any</u> structure or vehicle when a person is inside will subject the actor who burns the structure or vehicle guilty of Aggravated Arson, regardless

of ownership of the property. See appellant's brief, page 7. His argument that that policy does not extend to the burning of "any habitable structure" if that habitable structure is owned by the actor is illogical and meritless. The Legislature's intent that an actor may be guilty of Aggravated Arson by burning his own habitable structure is plain from the words of the Aggravated Arson statute.

It was proved at trial that the appellant did in fact intentionally and unlawfully burn a habitable structure. This justifies the trial court's finding of guilt of Aggravated Arson. For that reason and the other reasons set out above, the trial court's finding should be affirmed by this Court.

Respectfully submitted this 21st day of September, 1982.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius

EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Nancy Bergeson, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South 200 East, Salt Lake City, Utah, 84111, this 21st day of September, 1982.

Susan Patton